

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LUCKY CAB COMPANY

and

Case 28-CA-23508

**INDUSTRIAL, TECHNICAL AND
PROFESSIONAL EMPLOYEES UNION,
LOCAL 4873 affiliated with OFFICE AND
PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, AFL-CIO**

LUCKY CAB COMPANY

Employer

and

Case 28-RC-6766

**INDUSTRIAL, TECHNICAL AND
PROFESSIONAL EMPLOYEES UNION,
LOCAL 4873 affiliated with OFFICE AND
PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, AFL-CIO**

Petitioner

Pablo Godoy and Larry A. Smith, Attys., Las Vegas, Nevada,
for the General Counsel.

Sidney H. Kalban, Atty., New York, New York, for the
Charging Party/Petitioner.

Frederick C. Miner and David R. Keene II, Attys.,
Littler Mendelson, PC. Phoenix, Arizona and
Las Vegas, Nevada, respectively for Respondent/Employer.

DECISION

I. STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. Pursuant to unfair labor practice (ULP) charges and timely objections to a representation election of May 6, 2011¹ filed by Industrial, Technical and Professional Employees, Local 4873, affiliated with Office and Professional

¹ All dates herein are 2011 unless otherwise specified.

Employees International Union, AFL-CIO (the Union), the Regional Director of Region 28 of the National Labor Relations Board (Region 28 and the Board, respectively) issued a complaint and notice of hearing (complaint) and an order directing hearing on objections and notice of hearing (order on objections), both dated June 30, an order consolidating cases 28-CA-023508 and 28-RC-006766 dated July 1, and an amendment to complaint, dated September 6.² The complaint alleges that Lucky Cab Company (Respondent) violated Sections 8(a)(3) and (1) of the National Labor Relations Act (the Act).³ This consolidated case was tried in Las Vegas, Nevada on September 20 through 23, September 26, and November 2 and 3.

II. Issues

- A. Were road supervisors, Asrat Worku, Ioonis “John” Likos, and Karen Jacobs, supervisors within the meaning of Section 2(11) at material times.
- B. Did Respondent violate Section 8(a)(1) by the following conduct:
 1. Threatening employees with loss of benefits including 60-day leaves of absence, convenience leaves upon request, gas checks, clean upgraded cars, and Friday BBQs if they selected the Union as their bargaining representative;
 2. Threatening employees with unspecified reprisals if they selected the Union as their bargaining representative;
 3. Informing employees that it would be futile to select the Union as their bargaining representative;
 4. Threatening employees with loss of benefits, including the convenience of requesting days off, if they selected the Union as their bargaining representative;
 5. Threatening employees with less favorable shifts if they selected the Union as their bargaining representative;
 6. Threatening employees with unspecified reprisals because they refused to disclose their union membership, activities, and sympathies.
 7. Interrogating employees about their union membership, activities, and sympathies.
- C. Did Respondent violate Sections 8(a)(3) and (1) of the Act by terminating the following employees on the dates indicated:

Almethay Geberselasa – February 24	Elias Demeke – February 25
Endale Hailu – March 8	Melaku Tesema – April 6
Assefa Kindeya ⁴ – April 7	Mesfin Hambamo – April 21

² At the hearing General Counsel amended the Complaint to substitute the following names and titles for those set forth in paragraph 4:

Desiree Dante – Director of Operations	Steven Gerace – Asst Cab Operations Manager
Debra Slack – Human Resources Manager	Donald Chan – General Manager
Asrat Worku – Road Supervisor	Joey Hicks – Trainer/Biller
Jason Awad – Owner	Ioonis “John” Likos – Road Supervisor
Karen Jacobs – Driver Supervisor	

The parties corrected the name of John Lyck to Ioonis “John” Likos. General Counsel withdrew complaint allegations 6(6) and (h) and appropriately renumbered succeeding paragraphs.

³ In representation cases, an employer is traditionally referred to as “Employer” and the union as “Petitioner.” For convenience, Lucky Cab Company will be referred to throughout as “Respondent,” and Industrial, Technical and Professional Employees, Local 4873, affiliated with Office and Professional Employees International Union, AFL-CIO as “the Union.”

⁴ The name appears as corrected at the hearing.

- D. Did Respondent engage in conduct that affected the results of the representation election held May 6 so as to require setting it aside?

III. JURISDICTION

At all material times Respondent, a Nevada corporation, with an office and place of business in Las Vegas, Nevada (the facility), has been engaged in the business of taxi cab service in the Las Vegas, Nevada metropolitan area. During the 12-month period ending May 12, Respondent, in conducting its business operations derived gross revenues in excess of \$250,000. During the same 12-month period, Respondent purchased and received at the facility goods and materials valued in excess of \$50,000 that originated from points outside the state of Nevada.⁵ At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

IV. FINDINGS OF FACT: UNFAIR LABOR PRACTICE CASE

Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony regarding events occurring during the period of time relevant to these proceedings. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by General Counsel, the Union and Respondent, I find the following events occurred in the circumstances described below during the period relevant to these proceedings:

A. Work Rules and Policies

Respondent operates a fleet of taxicabs from its facility located on a large property bordered by Diablo Drive and Wynn Road. The facility includes the administrative offices, dispatch office, a trailer where employee meetings and training are held (the trailer), and parking for Respondent's taxicabs and limousines. The dispatch office looks out on the area in front of the administrative offices where two sets of bleachers are located (the bleacher or waiting area). The sets of bleachers are separated by several feet and the set to the east is designated a smoking area. The bleacher area serves as a waiting area for drivers awaiting dispatch. Respondent required drivers to be in the waiting area about 30 minutes prior to start of shift. A podium utilized by the dispatcher was placed a few feet west of the non-smoking bleacher.

Respondent employs about 240 drivers to operate about 150 taxicabs. Drivers employed by Respondent are initially hired as "extra" drivers, meaning they have no assigned route or shift. As shifts/routes become available, extra drivers are converted to permanent drivers and given specific shift/route assignments. Because of the potential to make higher "book," certain shifts/routes are more desirable than others.

The Nevada Taxi Cab Authority (TA) oversees Respondent's taxicab operations, enforcing various regulatory provisions of Chapter 706, *Motor Carriers*, of the Nevada Revised Statute (NRS). The TA conducts periodic, random audits of taxicab companies, called certificate holders, in which the TA may do the following: reconcile company records and trip sheets, check personnel files to ensure drivers have received a copy of rules and regulations

⁵ At the hearing, the General Counsel amended paragraph 2(c) of the complaint to include the words, "that originated directly from points outside the state of Nevada."

during employment orientation, check taxicabs for seatbelts, and check to see that drivers are not working in excess of 12 hours a day. Agents of the TA may periodically stop and inspect working taxicabs, checking for proper equipment, valid driver's licenses, TA driver's permits, and accurate and complete trip sheets.⁶ The TA also enforces prohibitions, including the following: high flagging (transporting a passenger without the meter engaged), long hauling (taking a passenger on a longer than necessary route to inflate the fare), smoking in a taxicab, leaving the cab unattended while on-duty, and ignoring taxicab stands. Such offenses both the certificate holder and the taxi driver can be penalized, up to and including loss of the certificate for the company and revocation of a driver's permit to operate a taxicab.

The TA issued Respondent colored metal plates called medallions, each of which was a license to operate a specific taxicab. The medallions, 102 of which were issued to Respondent, were affixed to individual taxi cabs and by color specified the physical operating parameters of the cabs to which they were attached. Some medallions were geographically restricted, preventing the taxi from picking up (but not dropping off) in an area known as "The Golden Triangle": McCarran International Airport, downtown Las Vegas, and the Las Vegas Strip.⁷ Operating a taxi outside medallion parameters violated both state regulations and company policy, a fact of which drivers were well aware through required TA training programs and Respondent's written policies, which were distributed to all drivers.

Each taxi driver was required to hold a TA permit, to be renewed yearly. Prior to permit expiration, a permit holder had a 30-day renewal opportunity, during which the permit holder was required to successfully complete a safety course. If the permit expired, the permit holder could not legally drive a cab until the permit was renewed. A driver had two chances to attend the prerequisite safety course; if the driver missed the first course, permit was suspended until the class was rescheduled. Missing the second class resulted in an indefinite suspension of permit until the safety class requirement was completed. During suspension, the certificate holder could not permit the driver to operate a taxi.

The TA required each driver to keep daily trip sheets in a form prescribed by the TA, which the TA used to monitor compliance with its rules.⁸ Drivers were required by law, at the beginning of a shift or duty period to log driver name and cab number; to record the shift start time along with current meter and odometer readings for the cab. During the shift, each driver was required to record on the trip sheet: (1) the time, place of origin and destination of each trip and (2) the number of passengers and fare for each trip. At the end of shift, each driver was to record shift end time along with meter and odometer readings. Respondent maintained a Global Positioning System (GPS) log of taxi positions during each shift.

Respondent's employee handbook, entitled Lucky Cab Company Policies, Procedures & Regulations (Employee Handbook) directed that trip sheets be submitted at the end of a driver's shift and provided detailed instructions for filling them out:

Top Section: 1. Write in your TA number; 2. Print your full name; 3. Write in your current telephone number; 4. write in the date; 5. Select your Medallion type/shift; 6. Write in the

⁶ Trip sheets, completed by each driver for each shift, detail information about the taxi's services.

⁷ Geographically restricted medallions were intended to ensure that persons outside of The Golden Triangle would receive adequate taxi service.

⁸ The TA could impose sanctions for trip sheet violations against both the company and the offending driver.

Cab number; 7. Write in the Medallion number; 8. Write in the number of radio calls taken (if none, put a zero)...; 9. Write in the number of NO-GO's (if none put a zero); 10. Write in the cost of gas; 11. Write in the number of gallons of gas. Mid Section: 2. Each time you pick-up and drop-off a fare, do the following a.) Enter the pick-up location of the trip in the "FROM" box; b.) Enter in the time of pick-up in the "TIME IN" box; c.) Enter in the drop-off location of the trip in the "TO" box; d.) Enter in the time of the drop-off in the "TIME OUT" box; e.) Enter in the number of passengers you are transporting in the "#of PASS" box; f.) Enter in the amount of the fare in the "AMOUNT" box.

Respondent permitted drivers a 1 hour 15 minute meal break, which was to be noted on the trip sheet. Because many of Respondent's drivers were from Ethiopia, Respondent permitted unpaid 60-day leaves of absence to accommodate the travel involved in visiting that country.

At all relevant times the following individuals held the following positions with Respondent. The first five named were admitted supervisors at the facility within the meaning of Sec. 2(11) and agents within the meaning of Sec. 2(13) of the Act; the status of the last three is in issue:

Jason Awad (Awad)– Owner
 Desiree Dante (Dante) – Director of Operations
 Steven Gerace (Gerace) –Asst Cab Operations Manager
 Debra Slack (Slack) – Human Resources Manager
 Donald Chan (Chan) – General Manager
 Ioonis "John" Likos (Likos) – Road Supervisor
 Asrat Worku (Worku) – Road Supervisor
 Karen Jacobs (Jacobs) – Road Supervisor

The Employee Handbook contained the following relevant policies and rules in pertinent part:

Provisions relating to discipline:

Progressive Counseling...Lucky Cab may exercise its discretion in utilizing forms of discipline that are less severe than termination in certain cases. These include verbal and written warnings, suspension, and loss of shift. Although one or more of these steps may be taken in connection with a particular employee, no formal order or system is necessary. Lucky Cab may terminate the employee without following these steps.

General Rules and Policies

...

3. All applicable laws and the regulations of the [TA] must be adhered to and are strictly enforced by the company.

...

6. You cannot drive a cab without your driver's license, physical card, and T.A. [permit] in your possession. Revocation of either card or your inability to pass a physical may result in your termination.

...

20. Any driver that is a habitual offender with the [TA] will face disciplinary action up to and including termination of employment.

...

21. The company will not grant more than a sixty (60) day leave of absence.

...

31. Driver Productivity: Driver productivity is the lifeblood of the company. It will be monitored very closely. Drivers that are consistently or repeatedly 10% or more below average will face disciplinary action up to and including termination of employment.

32. ...we DEMAND that all drivers wear their SAFETY BELTS AT ALL TIMES! It's the law, NRS 484.641.2.

...

34. You are entitled to a 1.15 hour lunch break and this must be noted on your trip sheet as you would any other trip.

...

36. Smoking is prohibited in all company vehicles as well as in the drivers' room and shop area.

Respondent's handbook lists 69 acts, the pertinent numbers of which are listed below, that would "generate some type of disciplinary action up to and including termination":

1. Any act which might jeopardize the Employer's certificate.

...

2. Falsifying a trip sheet.

...

14. Long hauling [taking a longer route than necessary].

...

24. Not wearing seat belts.

...

42. Smoking in a company vehicle.

...

62. Failure to ensure that the gas tank is completely full at the end of the shift.

63. Unsatisfactory productivity.

...

68. Being a habitual offender of T.A. Regulations.

B. Supervisory Authority of Likos, Worku, and Jacobs

Likos, Worku, and Jacobs were road supervisors. Respondent's employee handbook stated their authority as follows:

[Assistant/Backup Road Supervisors] have the direct authority to discipline employees up to and including issuing written warnings. Furthermore, through a reporting procedure [Assistant/Backup Road Supervisors] can recommend further administrative action, up to and including termination, which in most cases will be followed.⁹

Road supervisors performed normal taxi driving functions with the added responsibility of responding, and providing assistance, to drivers' problem situations, including but not limited to: providing a battery jump start; changing vehicle tires, providing street directions, restaurant recommendations, and trip price quotes, resolving driver-customer or inter-driver disputes,

⁹ While acknowledging the handbook's authority description of road supervisors, Dante testified that road supervisors did not issue discipline, except to send drivers home if the TA or the police determined the driver was involved in an at-fault accident.

completing accident investigation paperwork, and providing driver transportation when necessary.

Road supervisors were also responsible for observing other drivers and preparing daily reports of unusual situations (e.g., passenger threw up) and driver misconduct, such as traffic code violations, medallion violations, or driver smoking in a cab. Management reviewed the reports regularly and might take action based on reported information. Road supervisors exercised discretion in reporting misconduct. For example, “from [his] goodness,” Worku did not report a driver’s conduct until his February 12 report, detailed below. Some reports contained subjective assessments, as follows:

From Jacobs’ reports:

1-20-11: #863 Scott-rude-told another driver...“that was the worst update he has ever heard” I told him, that was not necessary! He also doesn’t have his radio at audio level.

1-27-11: #834 went thru a red light Trop & Swenson.

2-3-11: #857-stopped at his car. I told him he couldn’t do that until he was clocked out! He said he was sorry.

2-5-11: #840 Scott—argumentative. Rude! Accusing dispatch-not doing her job-then being rude to another driver over the radio...he has done this many time-and still continues to do it.

2-10-11: Mary Davis came to work late!

4-7-11: #800-he doesn’t respond to the dispatch. When he is asked a question, it takes 5 times to get him to answer.

From Worku’s reports:

2-12-11: #2875...[did not pick up the customer] This driver is not his first time to do like this. He keeps doing the same thing.

4-9-11: #2895...passenger throw up in his cab...by the time he went to the yard, it was 12:20...I didn’t put him on the road.

Road supervisors’ daily reports did not include discipline recommendations, but Respondent relied upon them to issue discipline with or without further investigation. A road supervisor’s report of a driver speeding, for example, could result in written discipline (“a paper may be generated”) or an oral discussion. A report on a driver smoking in a cab would cause Dante to “call [the offending driver] in and say you were observed...smoking in your cab, and to issue a verbal warning.” Road supervisor reports of customer pickups that violated medallion restrictions served as the basis for driver discipline.

C. Union organizational campaign

In 2009, the Union conducted an unsuccessful organizational campaign among Respondent’s drivers. In November 2010, hoping to renew organizational interest among Respondent’s drivers, several drivers contacted the Union. In the two months that followed, a number of drivers, including Almethay Geberselasa (Geberselasa), Elias Demeke (Demeke), Endale Hailu (Hailu), Melaku Tesema (Tesema), and Mesfin Hambamo (Hambamo) were named to the Union’s organizing committee. They in turn recruited additional drivers to assist in the organizing campaign, one of whom was Assefa Kindeya (Kindeya). On February 8, the Union provided union authorization cards to committee members to distribute among Respondent’s drivers. By letter dated February 25, the Union informed Respondent it was engaged in a union organizing campaign among the company’s drivers (the February 25 organizing letter).

Geberselasa, Demeke, Hailu, Tesema, Kindeya, and Hambamo, employed for the length of time and discharged as noted below, engaged in the following union activities among their fellow drivers in the following circumstances:

Gebersalasa (employed three years; fired February 24): After November 2010, Gebersalasa frequently talked about the Union to other drivers in the bleacher area during the 30-35 minutes before her shifts began, asking drivers if they were willing to sign union authorization cards; she thereafter told drivers she would obtain authorization cards from the Union on Wednesday, February 23. On Wednesday, February 23, Gebersalasa obtained authorization cards from the Union but was fired on Thursday, February 24 before she could distribute any.

Demeke (employed six years; fired February 26): Starting in mid December, Demeke talked about the Union to drivers in the bleacher area, by cell phone while waiting to pickup at the airport, and in driver gatherings after work; from about January 15, he served on the Union's organizing committee, and after February 8 distributed authorization cards to other drivers in the bleacher area. On one occasion on an unknown date, as Worku stood about a foot from him, Demeke distributed cards to other drivers in the bleacher area, telling them they needed the Union.

Hailu (employed six and a half years; fired March 8): Beginning in February, Hailu encouraged other drivers to sign authorization cards, as they waited for shift start in the bleacher area. Sometime about the end of February, Hailu told road supervisor Likos that if the drivers had a union, Respondent would not push them so hard about getting high book. Hailu enumerated other advantages of unionization, contrasting Respondent unfavorably with unionized companies.

Tesema (employed about three and a half years; fired April 6): Beginning in February, Tesema encouraged other drivers to complete union authorization cards while waiting for shift start in the bleacher area and while waiting to pick up at the airport. During times when Tesema distributed cards, Worku and Gerace were also in the bleacher area.

Kindeya (employed nearly four years; fired April 8): distributed union authorization cards at the facility in areas removed from the bleacher area, such as the parking area. On March 15 during his attendance at a driver safety meeting where Dante spoke, Kindeya told Dante that Respondent had failed to keep promises and that he was "going to choose the Union" and be involved in the Union.

Hambamo (employed nearly eight years; fired April 20): Beginning February 8, distributed union authorization cards to other drivers when he saw them waiting at the airport and at other cab stands.

A number of employees came to Dante with union authorization cards that had been given to them, asking what the cards meant and what effect signing them would have. Dante testified that no employee discussed authorization cards with her until about a week after receipt of the Union's February 24 organizing letter, an assertion I cannot accept.¹⁰

D. Alleged Independent Violations of Section 8(a)(1)

1. Respondent's Flyer

Following its receipt of the Union's February 25 organizing letter, Respondent distributed a flyer to employees (Respondent's flyer) that read (with emphasis as written) in pertinent part:

THE UNION WILL **NOT** DELIVER TO THE DRIVERS

** 60-DAY LEAVE OF ABSENCE
 ** CONVENIENCE LEAVE UPON REQUEST
 ** GAS CHECK
 ** OPEN DOOR [TO] DESIREE FOR MANAGEMENT ISSUES
 ** CERTAINTY CLEAN UPGRADED CARS
 ** JOB SECURITY
 ** FRIDAY BAR-B-QUE

THE ABOVE **ARE** some of the many LUCKY BENEFITS *EVERY DRIVER NOW ENJOYS!* ...BEWARE UNION CANNOT

**** PROVIDE JOB SECURITY -- FOR WRONGFUL & ILLEGAL ACTS¹¹**

BUT...YOU SHALL PAY EXPENSIVE UNION DUES!!
VOTE NO ON UNION!

2. Respondent's March Statements to Employees at Driver Safety Meetings

Between March 15 and 17, Respondent held seriatim driver safety meetings at the facility involving all drivers. In some, but not all, of the meetings, Dante spoke to groups of 20-40 employees about the union organizing. Employees Sisay Eba (Eba), Tesema, and Hambamo attended meetings at which Dante spoke. Each testified that Dante said if employees selected the Union, they would lose the current 60-day leave of absence benefit. All but Eba testified that Dante warned employees they would lose the gas bonus. Eba recalled that Dante said the current method of scheduling shifts would change; Tesema and Hambamo recalled Dante saying that management's open door and vacation policies would end.

Dante denied telling employees that any benefits would change if they chose the Union. According to Dante, she encouraged employees to educate themselves about the Union by

¹⁰ Dante's testimony often appeared expedient rather than candid. I find it inherently unlikely that although card distribution began around February 8, no drivers questioned Dante about the cards until early March. I do not accept Dante's testimony of when she knew of union organizing among employees.

¹¹ The phrase "for wrongful & illegal acts" was in smaller type than the bolded "provide job security" phrase.

5 talking to other drivers before making the decision they felt was best for them. She also touched on some of Respondent's unique benefits, i.e. the 60-day leave of absence, biannual gas bonus awards, and merit shift assignments.

10 I have carefully considered the manner and demeanor of the witnesses who testified about Dante's remarks at the March safety meetings, and I credit the employee witnesses. In addition to an unconvincing manner, Dante's testimony was general and uncorroborated by any contemporaneous notes, which might reasonably be expected when multiple employee assemblies were addressed. Further, the witnesses' testimonies are consistent with statements in Respondent's flyer, i.e. that the Union would not deliver 60-day leaves of absence and gas bonus benefits or open-door management.

15 3. Hambamo's April 15 conversation with Jacobs

20 On the afternoon of April 15, while Hambamo sat on the non-smoking bleachers in the waiting area, Jacobs, standing a few feet away, crooked her finger for Hambamo to come to her. When Hambamo complied, Jacobs asked him what the employees were trying to do with the Union. Hambamo asked what she was talking about, and Jacobs said, "The Union, the thing that you are trying to organize."

Hambamo said he was unwilling to discuss the issue with her at that location. Jacobs said, "Are you sure?" Hambamo said he was positive and returned to the bleachers.

25 Jacobs went into the office; returning a few minutes later, she asked Hambamo if he was quite sure he didn't want to discuss the issue, saying, "If you don't want to speak, I'm going to hurt you."

30 Hambamo asked why Jacobs was threatening to hurt him. Jacobs said, "Because you said that you don't want to discuss about the union with me. Because I want to know what you guys are doing and you're refusing. That's why." Jacobs said she was joking about hurting Hambamo.¹²

35 E. Terminations of Geberselasa, Demeke, Hailu, Tesema, Kindeya, and Hambamo.

1. Geberselasa

40 According to Gerace, on February 17,¹³ he received a telephone complaint from an anonymous person¹⁴ who said, "Your restricted cab is picking up at a hotel that they're not supposed to do that." The next day, Gerace reviewed Geberselasa's February 17 trip sheet. The trip sheet showed that at 4:29 Geberselasa picked up at the Westin Hotel (160 East Flamingo Road) and delivered at the Best Western Motel (both unrestricted areas). As written,

¹² Jacobs denied having such a conversation with Hambamo. I found Hambamo to be a candid and reliable witness, and I credit his account. Respondent argues the conversation could not have taken place, as Jacobs' shift would not have put her at Respondent's facility at that time. The fact that Jacobs' shift did not overlap the time of the conversation does not preclude her having been at the facility then.

¹³ Gerace initially testified the date was February 24, the "day I terminated [Gebersalasa]," then corrected himself to say it could have been February 17.

¹⁴ Gerace testified, "I don't know if it was a customer, other driver, Taxicab Authority, metro, I don't know who it was."

the trip sheet showed no infraction. Gerace reviewed the February 17 GPS trip log for Geberselasa's cab, which showed a corresponding GPS location of 103 East Flamingo Road, the address of Bally's, a restricted hotel a few blocks from the Westin Hotel.¹⁵ Gerace did not contact or interview Geberselasa about her trip sheet before directing that she be fired.¹⁶

After arriving at work on February 24, Geberselasa was called to a meeting with Slack and Dante. Slack gave Geberselasa a Personnel Action Form (PAF) and said she was being terminated for picking up a customer from a restricted area on February 17. The PAF read:

1. In reviewing your trip sheet against the GPS report the following discrepancies' were found. At approximately 4:29 p.m. your trip showed that you had picked up at the Hilton¹⁷ and dropped at the Best Western, when the GPS report showed that your Cab was at 103 E. Flamingo Rd. (Bally's).
2. Your trip sheet indicated that at 8:17 p.m. you picked up at Hooters and dropped at the Venetian. The GPS report showed that your Cab was at 3746 Las Vegas Blvd - (City Center).
3. You were also driving a Night Restricted Cab which prohibits you from picking up passengers that are listed in (1) & (2). Reference enclosed "Geographically Restricted" list. By doing this you placed the Company in jeopardy of losing their certificate.¹⁸

Gebersalasa tried to explain her February 17 trip sheet, but Dante would not listen.¹⁹ Dante gave Gebersalasa her final paycheck and wished her luck. Slack told Gebersalasa not to speak

¹⁵ Considerable testimony was taken regarding the accuracy of GPS logs, in which Gerace assertedly placed absolute confidence. It is unnecessary to resolve a question of GPS accuracy, as the issue is not the GPS accuracy but whether Gerace had a reasonable belief in its accuracy sufficient to warrant his conclusion that Geberselasa had falsified her trip sheet.

¹⁶ I cannot accept Gerace's account of his being alerted to and his later investigation of Geberselasa's February 17 conduct. I found Gerace to be an unreliable witness. In this, as in later-detailed instances, his testimony was facile, self-serving, and sometimes improbable. I do not credit Gerace's vague testimony of a catalyzing complaint about Gebersalasa's pickup. His initial testimony that the complaint came on the same day as the termination appeared to be a miscalculated ordering of events rather than mere confusion, and it is inherently implausible that Gerace would not have a clearer recollection of the complaining party in a situation so serious that it resulted in a discharge.

¹⁷ According to Gerace, "Hilton" was an error. The PAF should have read, "Westin," as written on Geberselasa's February 17 trip sheet. The Westin was in an unrestricted area.

¹⁸ Geberselasa denied having picked up a fare in a restricted area on February 17. Both General Counsel and Respondent offered considerable testimony as to whether Geberselasa's February 17 trip sheet and corresponding GPS tracking showed pick up in a restricted area, but neither party provided evidence that clearly resolved the question. I find that while Geberselasa may not have made an improper pickup, the trip sheet and GPS tracking, at least superficially, may have provided contrary evidence.

¹⁹ Slack testified she always gives employees facing discharge an opportunity to explain or justify their actions, which sometimes results in a reversal of the termination decision. Slack initially testified that she and Dante questioned Geberselasa about what had happened, and Slack asked Geberselasa if she wanted to explain, which offer the driver declined. When pressed as to what questions the managers had asked Geberselasa, Slack testified that she read the PAF to Geberselasa and asked Geberselasa if she had any questions, which does not amount to an explanation opportunity. Where testimonies differ, I credit Geberselasa.

to anyone as she left Respondent's property. Before leaving, Geberselasa told Slack she knew she was being fired for union activities. Slack only said goodbye.

5 Geberselasa had improperly picked up in restricted areas in the past, which she documented on her trip sheets but for which she was not disciplined. Management witnesses denied knowledge of Geberselasa's prior restricted-area pickups. A trip sheet completed by Geberselasa on May 29, 2010 shows a pickup at the Grand Vacation Hilton (a restricted area); a written notation on the trip sheet reads "6/11 Verbal...counsel[ed] regarding filling out trip
10 sheet accurately [Dante]." A trip sheet completed by Geberselasa on July 17, 2010 shows a pickup at the Sahara (a restricted area); a written notation on the trip sheet reads "7/30 Verbal...counsel [Dante]," which verbal counseling was for failing to clock out. Geberselasa received neither discipline nor counseling for the restricted-area infractions noted on the May 29, 2010 and July 17, 2010 trip sheets. It is reasonable to infer from the written notations of
15 verbal counseling on the May 29, 2010 and July 17, 2010 trip sheets that management reviewed them. I find, therefore, contrary to management denial of knowledge, that management knew of Geberselasa's prior restricted-area pickups.²⁰

20 In explaining Respondent's reasons for discharging Geberselasa without prior warning, Gerace testified:

25 Geberselasa was a very aggressive driver...she was very combative with me whenever I would talk to her about something. I was trying to help her and she would be combative. She would storm out of my office and she would yell things out in the parking lot. She admitted to me many times that she did the same violation over and over and over again. I just felt termination was warranted with her.²¹

2. Demeke

30 During his employment with Respondent, Demeke incurred discipline for such infractions as trip sheet violations, low productivity, suspension of TA permit, and threatening to shoot and kill one of Respondent's office employees,²² but until February 25, he was not terminated.

35 When Demeke reported to work on February 25, he was directed to meet with Slack and Gerace. The managers gave Demeke a PAF, which they told him to read and sign. The PAF read in pertinent part:

- 40 a.) On 01/09/11 and 01/28/11 you failed to sign your Trip Sheet.
b.) On 01/15/11, 01/24/11 & 02/24/11 you failed to clock in at the end of your shift
c.) Also you failed to list your break periods on your Trip Sheet. In comparing your Trip Sheet against the GPS report your cab was parked at 4249 Las Vegas Blvd at 9:54 p.m. and then again at 2:28 a.m. your

²⁰ Respondent terminated Stanley Milano in August 2009 for picking up in a geographically restricted area, as observed by a driver supervisor, and entering inaccurate information on his trip sheet. No other information about the circumstances of the discharge was adduced.

²¹ Geberselasa was never counseled or disciplined for being "aggressive" or "combative."

²² Demeke was disciplined on May 21, 2010, May 29, 2010, June 5, 2010, July 15, 2010, September 24, 2010, November 4, 2010, and December 3, 2010 for trip sheet violations.

Cab was parked at 4727 W Flamingo Rd and nothing was written on your Trip Sheet.²³

5 Neither manager discussed Demeke's past discipline, explained the PAF statements, or asked Demeke for any explanation. Demeke refused to sign the PAF; the managers gave him his final check, and Demeke left the facility.

3. Hailu

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Respondent disciplined Hailu multiple times before firing him on March 8: multiple counselings for trip sheet violations, a suspension for insubordination, eight low productivity warnings, three drive cam violations, and eight notices for cash drop shortages.

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A few days after Hailu's conversation with Likos about the Union, on March 8, he was directed to meet with Slack and Gerace. Slack gave Hailu a PAF and told him he was terminated. When Hailu asked why, Slack told him to read the PAF, which, in pertinent part stated:

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1. On 02/28/11 your Trip Sheet is missing the Gas dollar amount as well as the gallons amount.
2. On 03/05/11, 03/06/11 & 03/07/11 you have listed that you have a total of two radio calls, yet your Trip Sheets shows only one "R" listed in the Radio column for those days.
3. On your Trip Sheets for 03/04/11, 03/05/11 & 03/06/11 your Trip Sheet fare totals do not match the Trip Log report.²⁴

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...
You've been counseled on 5/29/10, 36/11/10, 09/24/10, 11/19/10, 02/05/11 & 2/19/11, regarding these issues. On 02/05/11 you were counseled regarding Trip Sheet violations and it was noted that any other violations would result in termination.

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Although not mentioned in Hailu's PAF, Gerace testified that Hailu was fired for the additional infractions of "lying" about the places and times he picked up passengers up.

4. Tesema

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On April 8, Slack called Tesema into her office. She gave him a PAF and told him he was terminated. In pertinent part, the PAF stated:

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On 09/01/10 you were issued a final warning regarding filling out your trip sheet accurately.²⁵

²³ Drivers were entitled to a 1.15 hour lunch break, which was to be noted on a driver's trip Sheet. Gerace considered failure to log breaks to constitute trip sheet falsification.

²⁴ Slack testified that but for reason three, Hailu would not have been fired.

²⁵ The specific infractions were failing to record breaks and trips on the July 26, 2010 trip sheet, which assertedly constituted falsification.

Now again your trip sheet dated 04/03/11 shows that you failed to log a ride, at 10:10 p.m. to 10:45 p.m. your cab was parked at 2890 W Sahara Ave, Las Vegas, NV, and there was nothing noted on your trip sheet.²⁶ This is considered falsification and therefore termination is warranted immediately.

Also on 04/03/2011 your trip sheet shows that you had one Radio Call yet there is nothing listed on your trip sheet indicating that ride.

Please be advised that you were issued a final warning and based on these new trip sheet violations your position as a Cab Driver has been terminated effective immediately.

Dante testified that Tesema's failing to note his lunch break was falsification because he did not justify his time, even though he was entitled to it. She acknowledged that drivers often forget to mark their meal breaks. She said she would not expect drivers to log a ten-minute break but would expect recordation of a 90-minute break.

5. Kindeya

On April 8, Slack gave Kindeya a PAF and told him he was terminated. The PAF stated:

On 04/04/11 your cab was at the pumps at 11:23 p.m., this is against company policy and procedures drivers must complete their assigned shift and are not allowed to gas-up prior to an half an hour before your shift ends.

On 04/04/11 your trip sheet shows that you took a Radio Call, yet your trip sheet does not indicate that ride.

On 03/29/11 you were caught driving via the cabs DriveCam camera for not wearing your seatbelt. This is in violation of company and state policy...

On 03/01/11 & 03/29/11 you failed to enter in the correct number of radio calls...On 03/28/11 you failed to enter in your telephone number on your trip sheet. You have been counseled regarding filling out your trip sheets back on 06/04/10 & 06/11/10.

Gerace testified that an underlying, though unarticulated, reason for discharge was that Kindeya was "very combative [and] resisted advice." Respondent provided no corroborative documentation, including prior counseling or discipline, to support Gerace's criticism.

6. Hambamo

On April 13, Hambamo was scheduled to attend the TA's Driver Safety Program class, as the prerequisite to renewing his TA permit. Hambamo failed to attend and complete the course on April 13. He rescheduled to attend the course on April 20 but was denied admission when he arrived late. Since the remaining classes on April 20 were full, Hambamo had to sign up for an April 27 class.

When Hambamo reported to work on April 20, he explained the situation to Gerace, who later gave him a PAF, stating: You are being suspended 1 shift because your T.A. permit has been Revoked you are to report back to this office on 4/21/2011 at 2:00 PM." Hambamo told Gerace his TA permit had been suspended, not revoked. Gerace said Hambamo should not worry about the wording of the PAF, that it was "only a statement," and Hambamo should sign it.

²⁶ That was the address of the restaurant where Tesema took a 25-minute meal break, a break time well under Respondent's limit, but which Tesema failed to note on his trip sheet.

About an hour and a-half later, Slack telephoned Hambamo. Slack told Hambamo he was no longer employed by Respondent and that he needed to come in to complete paperwork. The following morning, April 21, Hambamo met with Slack in her office. Slack gave him a PAF, reading in pertinent part:

Lucky Cab was notified by the [TA] on 4/20/11 that you have failed to attend a second Driver's Safety Program class. Failure to abide by company policy and procedure as well as per NRS laws will result in disciplinary action up to and including termination. Please be advised that your position as a Cab Driver has been terminated effective today 14/21/11.

Hambamo attended the Driver Safety course on April 27, after which his permit was immediately reinstated by the TA.

Respondent introduced into evidence a PAF for one driver assertedly terminated in October 2009 for failing to maintain a valid TA permit. The document consists of two pages. The first page, dated October 22, 2009, states the reason for discharge as "failed probation." The second page is dated September 14, 2011, and states in pertinent part, "You are being terminated because of your failure to keep a valid TA card." When asked to explain the first page/second page discrepancy in dates, Gerace testified, "You know, it's a computer-generated time. I couldn't answer that without speculation. It's got to be a computer error, that's all I could say. It's very interesting that you brought that up because I don't know how that could've been there like that." It is reasonable to infer that Respondent generated the second page of the PAF shortly before commencement of trial to bolster Respondent's case against Hambamo.

General Counsel presented evidence of three drivers, each of whom missed a second scheduled TA class (Abraham Worke, Metekya Absu, and Demeke) but were not terminated. Although Gerace said Absu was on leave of absence at the time he missed his second class, which Respondent apparently considered as mitigation, Gerace could not explain Respondent's restraint as to the other two drivers.

7. Discipline Issued to Other Drivers

Respondent introduced evidence of discipline for a number of drivers, identified by their initials, including the following:

AY--fired November 4, 2010: counseled and issued a final warning on July 13, 2010. On October 28, 2010, cab parked, respectively, for 25, 97, 60, and 25 minutes without trip sheet notation.

GC--fired February 5, 2010: trip sheet showed activity from 5:14 a.m. to 3:26 p.m., while trip log showed activity from 10:39 a.m. to 3:26 p.m.

DC--fired January 28, 2010: failed probation; on January 26, 2010, discrepancies between GPS and trip sheet information.

CE--fired September 11, 2009: on September 10, 2009, large gaps of time unaccounted for on the trip sheet.

AG--fired March 5, 2010: on February 14, February 21, and February 23, 2010, incorrect fare amounts and cab parked for 60, 55, and 25 minutes, respectively, although trip sheet showed loading and dropping off during those periods.

SM--suspended on September 1, 2010 and fired on September 2, 2010: On August 25, 2010, overall breaks totaled 1 hour 50 minutes; repeated counseling in the past regarding

productivity, referred to a training class on August 12, 2010.

WS—fired December 1, 2010: on April 27, 2010, counseled and given final warning regarding productivity and falsifying trip sheets; on November 24, 2010 GPS report showed cab stopped for seven hours.

PS—fired July 3, 2009: on April 10 and June 5, 2009 counseled and warned for, respectively, failing to follow company policies and for incorrectly filling out trip sheets; on July 2, 2009, failed to fill out trip sheet correctly, failed to clock out properly, lunch breaks were over an hour; performance for June was low.

DW—fired July 4, 2009: failure to clock out and to complete June 27, June 29, and July 2 trip sheets accurately; low productivity.

MH—fired July 19, 2009: failure to complete accurately trip sheets on six different days from July 8 to July 16, 2009; low productivity.²⁷

General Counsel introduced evidence from the personnel files of 23 drivers who were disciplined but not terminated for infractions identical to those committed by the six alleged discriminatees including low productivity, and trip sheet and medallion violations. Gerace testified that the discipline accorded these drivers was not comparable to that of the six alleged discriminatees because the unterminated drivers' circumstances fit within a "safety period" maintained by Respondent, a justification produced late in the hearing.

Gerace was called by General Counsel as a witness in the government's case in chief, but it was not until he testified during Respondent's defense presentation that he claimed Respondent had a "safety period" during which drivers were allowed to commit up to five different trip sheet violations within a six month period of time before being terminated. Gerace was vague as to details of the safety period and could not identify any document or oral promulgation of any such policy.²⁸ When confronted with personnel records of employees who were not terminated despite having more than five trip sheet violations within a six month period,²⁹ Gerace testified that Respondent treated each category of trip sheet violation separately in calculating the 5-time maximum. In later testimony regarding Respondent's failure to terminate an employ with multiple violations breaching the safety period policy, Gerace added a further qualification that where the same violation may have occurred four or five days running, Respondent lumped the separate violations into one for purposes of the safety period policy. I find Gerace's testimony in this regard to be so uncorroborated and inconsistent as to

²⁷ At the hearing, General Counsel objected to receipt of these documents as being incomplete as to, inter alia, employment tenure, and argues they should be afforded little weight. The documents do not establish the length of employment of the discharged employees, and that deficiency impacts the weight to be accorded the documents.

²⁸ Gerace first testified the safety policy was contained in the employee handbook and that Dante knew of it, although he was not sure how she knew. When Gerace could not find such a policy in the handbook, he said it was an understood rule among managers.

²⁹ Six drivers incurred six or more technical violations within six months but were not terminated, i.e. TS failed to write his phone number on his trips sheets 16 times in a thirty day span; AW failed to clock out at the end of his shift five times within eight days; JG-O failed to clock out at the end of his shift six times within one month; RB failed to clock out five times in seven days in November 2010, and five times in 43 days between January 27 and March 11; NN failed to write his phone number on his trip sheets 14 times in a 33 day span between October 14 and November 16, 2010, and was not terminated.

merit no weight whatsoever. Since I do not accept that the safety period policy ever existed, it is unnecessary to detail facts demonstrating that the policy was inexplicably not applied to some of the six alleged discriminatees so as to avert their discharges.

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V. Discussion

A. Supervisory Status of Road Supervisors Likos, Worku, and Jacobs

10 The stated supervisory authority of road supervisors Likos, Worku, and Jacobs was to discipline employees up to and including issuing written warnings and, through a reporting procedure effectively recommend further administrative action, including termination. While no evidence was adduced that the road supervisors directly issued discipline, as authorized by the handbook, there is no evidence that they were, in fact, dispossessed of that authority. Failure to
15 exercise authority does not negate supervisory status because possession rather than exercise of supervisory authority determines supervisory status. *Westwood Health Care Center*, 330 NLRB 935, 938 (2000).

20 Notwithstanding the road supervisors' failure directly to discipline employees, it is clear they were charged with responsibility to report the driver infractions they observed. The evidence shows the road supervisors exercised significant discretion in determining whether to report infractions³⁰ and engaged in subjective editorializing about the infractions.³¹ Their reports, laying as they did, foundations for future discipline against drivers, were a form of discipline. See *Oak Park Nursing Care Center*, 351 NLRB 27 (2007).

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Respondent argues that while management may take disciplinary action based on information submitted in road supervisors' daily reports, the reports contain no discipline recommendations and are simply observations. It is true that purely reportorial functions are not effective recommendations of discipline so as to confer supervisory authority. But the assigned
30 duty to report the infractions of other employees can be purely reportorial only if an employer conducts its own investigation of the reported misconduct. See *Los Angeles Water and Power Employees' Association*, 340 NLRB 1232, 1234 (2003) (individual's report of misconduct does not constitute effective recommendation of discipline where management undertakes its own investigation and decides what, if any, discipline to impose); *Ryder Truck Rental, Inc.*, 326 NLRB 1386 (1998) (authority to issue verbal or written warnings that do not affect employee
35 status or to recommend discipline do not evidence disciplinary authority); *Millard Refrigerated Services, Inc.*, 326 NLRB 1437, 1438 (1998) (employees did not effectively recommend discipline when they submitted disciplinary forms to the plant superintendent who approved them only after conducting an independent investigation; the employees exercised nothing more
40 than a reportorial function). Since Respondent regularly based discipline on the road supervisors' reports without conducting intervening, independent investigation, the reports played a significant role in the disciplinary process and amounted to effective recommendation of discipline. See *Bon Harbor Nursing and Rehabilitation Center*, 348 NLRB 1062 (2006). Accordingly, road supervisors Likos, Worku, and Jacobs were, at all times material hereto, 2(11)
45 supervisors.

³⁰ As when Worku, from his "goodness," did not report a driver's conduct.

³¹ As when Jacobs pronounced employee Scott to be argumentative and rude many times over.

B. Independent Violations of Section 8(a)(1) of the Act

1. Respondent's Flyer and Dante's March 15 Statements

5 The complaint alleges that through printed communication to its employees, Respondent threatened employees with loss of benefits, including 60-day leaves of absence, convenience leaves upon request, gas checks, clean upgraded cars, and Friday BBQs, and other unspecified reprisals if they selected the Union as their bargaining representative, and further informed employees it would be futile to select the Union as their bargaining representative.

10 Respondent's flyer, distributed to employees sometime after February 25, stated adamantly that the Union would not deliver to the drivers benefits they then enjoyed: 60-day leaves of absence, convenience leave upon request, gas bonus checks, open door to management, clean upgraded cars, Friday bar-b-que, and job security. Respondent's flyer reiterated that employees should "beware" because the Union could not provide job security.

15 Respondent argues the flyer simply invited employees to contrast Respondent's enumerated benefits with those of unionized taxi companies, which was not threatening and which was protected by Section 8(c).

20 The complaint also alleges that between March 15 through March 17, Dante threatened employees with loss of benefits, including gas checks, 60-day leaves of absence, and the convenience of requesting days off, and with less favorable shifts if they selected the Union as their bargaining representative. I have found credible General Counsel's witness accounts of what Dante said in the March meetings with employees, and I find she told employees that if they selected the Union, they would lose their 60-day leave of absence benefit, their gas bonus, their method of scheduling shifts, their vacation policies, and their open door access to management.

25 30 It is unlawful under Section 8(a)(1) for an employer to "interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights. In deciding whether a statement is threatening or coercive, the Board applies the objective standard of whether the remark would reasonably tend to interfere with the free exercise of protected employee rights. If it would, it is unlawful.³²

35 40 Neither Respondent's flyer nor Dante's March statements made any attempt to clarify statutory collective bargaining obligations or qualify the circumstances under which give and take labor negotiations might result in benefit trade offs. An objective reading of Respondent's flyer as well as consideration of the credited accounts of Dante's March statements show Respondent threatened employees with the loss of benefits and job security upon selecting the Union.

³² *Flagstaff Medical Center, Inc.*, 357 NLRB No. 65, slip op 7-8 (2011); *KenMor Electric Company, Inc.*, 355 NLRB No. 173, Sl. Op. 4 (2010); *Joseph Chevrolet, Inc.*, 343 NLRB 7, 9 (2004), enf'd. 162 Fed. Appx. 541 (6th Cir. 2006). [Citations omitted]; *Southdown Care Center* 308 NLRB 225, 227 (1992); *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995), enf'd. 134 F.3d 1307 (7th Cir. 1998); *Miami Systems Corp.*, 320 NLRB 71, 71 fn. 4 (1995), aff'd. in relevant part 111 F.3d 1284 (6th Cir. 1997).

Since Respondent's flyer and Dante's statements were devoid of any indication that Respondent intended to bargain in good faith with the Union, if selected, the statements that union selection would "not" deliver established benefits or job security informed employees that union representation would be an exercise in futility. Since Respondent's statements, written and oral, would reasonably tend to interfere with employees' free exercise of protected rights, the statements violate Section 8(a)(1).

2. Jacobs' Interrogation and Threat

In determining whether interrogation is unlawful under Section 8(a)(1), the Board applies a totality of the circumstances test. *Westwood Healthcare Center*, 330 NLRB 935 (2000); *Rossmore House*, 269 NLRB 1176 (1984). The Board said it would look at five factors to determine whether the questioning of an employee constitutes an unlawful interrogation: (1) The background, i.e., is there a history of employer hostility and discrimination? (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees? (3) The identity of the questioner, i.e., how high was he in the company hierarchy? (4) Place and method of interrogation, e.g., was employee called from work to the boss's office? Was there an atmosphere of unnatural formality? (5) Truthfulness of the reply.

As detailed above, on April 15, Jacobs, seeing Hambamo in the bleacher area, asked what the employees were trying to do with the Union. After Hambamo feigned puzzlement, Jacobs pressed him, and elicited Hambamo's unwillingness to discuss the issue with her at that location. A short time later, Jacobs asked Hambamo if he was quite sure he didn't want to discuss the matter, saying that if he did not, she was going to hurt him because she wanted to know what the employees were doing.

Putting Jacobs' interrogation of Hambamo to the *Rossmore* test, although several of the *Rossmore* factors are not met, it is clear the questioning would reasonably tend to coerce Hambamo, causing him to feel restrained from exercising rights protected by Section 7. Thus, although the setting was casual and Jacobs a low level supervisor, the interrogation occurred in an atmosphere of unremedied threats, coercion and unlawful discharge of active union proponents, as detailed below. Jacobs conducted the questioning near Respondent's offices, which location might reasonably be expected to disquiet Hambamo, who attempted to evade her questions. Jacobs clearly sought information about the union organizational effort, saying, "I want to know what you guys are doing." The reasonable inference to be drawn from Jacobs' unexplained curiosity was that she intended to take some action that would disadvantage union supporters. In these circumstances, Jacobs' interrogation and threat to "hurt" Hambamo, notwithstanding her characterizing the threat as a joke, would reasonably tend to coerce and restrain Hambamo in violation of Section 8(a)(1).

C. Terminations of Geberselasa, Demeke, Hailu, Tesema, Kindeya, and Hambamo

General Counsel contends that Respondent terminated Geberselasa, Demeke, Hailu, Tesema, Kindeya, and Hambamo for engaging in union activities and that its claimed bases were pretextual. Respondent argues that General Counsel has not shown the requisite knowledge and animosity to establish a prima facie case, or, in the alternative, that Respondent met its burden of proving that Geberselasa, Demeke, Hailu, Tesema, Kindeya, and Hambamo would each have been terminated even in the absence of union activity.

In termination cases turning on employer motivation, the Board applies an analytical framework that assigns the General Counsel the initial burden of showing that union activity was a motivating or substantial factor in an adverse employment action. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The elements required to support such a showing are the employee's union activity, employer knowledge of the activity, and employer animus toward the activity. If the General Counsel meets the initial burden, the burden of proof then shifts to the employer to show, as an affirmative defense, that it would have taken the same action even in the absence of the employee's protected activity. *Wright Line*, at 1089; *Alton H. Piester, LLC*, 353 NLRB 369 (2008).

General Counsel has clearly met two prongs of its initial *Wright Line* burden. General Counsel adduced credible evidence of the union activities of Geberselasa, Demeke, Hailu, Tesema, Kindeya, and Hambamo, all of whom were members of the Union's organizing committee and fully engaged in soliciting union support among fellow drivers, some as early as November 2010. By proving the independent violations of Section 8(a)(1) described above, General Counsel has shown Respondent's animus toward employees' union activities. The only *Wright Line* prong open to further discussion is the question of Respondent's knowledge of union activities.

Respondent was unquestionably aware of union organizing when it received the Union's letter on about February 25, announcing the organizational drive. There is no direct evidence Respondent knew of the organizing effort before February 25 and no direct evidence Respondent knew of the activities of specific employees. In determining whether employer knowledge existed before February 25, the totality of circumstances may support an inference of knowledge generally and specifically. *Best Plumbing Supply*, 310 NLRB 143, 144 (1993). Such circumstances may include timing and abruptness of discharge, contemporaneous 8(a)(1) conduct, absence of credible evidence to support the discharges, and pretextual reasons for discharge. *Id.*; *PanOston Co.*, 336 NLRB 305, 308 (1988).

By the following circumstantial evidence, General Counsel has demonstrated that Respondent knew generally of union organizational efforts by at least early February and knew of, or suspected, the active involvement of Geberselasa, Demeke, Hailu, Tesema, Kindeya, and Hambamo: (1) Beginning in November, Geberselasa often talked about the Union to other drivers in the bleacher area during the 30-35 minutes before her shift began. The bleacher area was immediately in front of Respondent's offices and regularly frequented by supervisors.³³ (2) Beginning in December, Demeke often talked to drivers in the bleacher area about the Union and on one occasion distributed authorization cards as Worku stood nearby.³⁴ (3) Beginning in February, Hailu and Tesema solicited employees to sign authorization cards in the bleacher area; Hailu made his prounion sentiments known to Likos, and Worku and Gerace were also in the bleacher area at times when Tesema distributed cards. (4) Kindeya distributed cards in

³³ It is reasonable to infer that supervisors would be aware of frequent, long term organizing efforts occurring so close to office and dispatch areas.

³⁴ It is reasonable to infer that Worku would have seen Demeke's distribution of cards, and Worku's knowledge is imputed to Respondent. See *State Plaza, Inc.*, 347 NLRB 755, 756-757 (2006).

areas other than the bleacher area; he told Dante on March 15 that he was "going to choose the Union."³⁵ (5) Hambamo was the object of Jacobs' April 15 interrogation and threat.³⁶

(6) Authorization card solicitation, which began on February 8, was reported to Dante by various employees. I have not credited Dante's testimony that it was not reported until February 25.

Since the reporting related to questions about the cards' purpose, it is reasonable to infer that it began soon after card distribution commenced. (7) Gerace's incredible and shifting

explanations of the bases for discharge of the six alleged discriminatees. (8) Respondent's generation of a spurious document to bolster its case against Hambamo; (9) Gerace's

additional, post-discharge termination reasons for Gebersalasa and Kindeya, i.e., respectively, because Gebersalasa was "aggressive" and "combative," and Kindeya was "very combative," when neither was counseled about such behavior, justifies an inference that the descriptions were disguised references to Gebersalasa and Kindeya's protected, concerted activity. See *Rock Valley Trucking Co.*, 350 NLRB 69 (2007). (10) Respondent's unexplained April 21 shift in

Hambamo's discipline from suspension to termination. (11) Termination of Tesema for, in part, failing to log a 25 minute break, despite Dante's acknowledgment of frequent driver failure to log meal breaks

The same circumstantial evidence that created a reasonable inference of knowledge substantiates Respondent's discriminatory motivation. The evidence, detailed above, of contrived defenses,³⁷ timing,³⁸ departure from past practice, brusque terminations of six long-term employees³⁹ without permitting explanation or justification, the unusually high number of discharges in a relatively short period before the election reinforces General Counsel's proof of animus and discriminatory motivation. Consequently, General Counsel has met the initial burden under *Wright Line* by showing the union activity of Gebersalasa, Demeke, Hailu, Tesema, Kindeya, and Hambamo, Respondent's knowledge of it, and Respondent's animus toward it. General Counsel having presented probative evidence of protected activity, employer knowledge, and employer animus, the burden shifts to Respondent to show, as an affirmative defense, that it would have taken the same action against Gebersalasa, Demeke, Hailu, Tesema, Kindeya, and Hambamo even in the absence of their protected activities.

Respondent has not met its burden; Respondent has not shown that the six alleged discriminatees would have been fired regardless of their union activities. Respondent has unsuccessfully attempted, by comparison of discipline records, to show that the six alleged discriminatees were treated the same as similarly situated employees. The numerous factors involved in individual disciplines documented herein make it difficult to formulate concrete comparisons, a drawback compounded by the failure of Respondent's termination documents to

³⁵ Likos' knowledge of Hailu's pronoun sentiments is imputed to Respondent as is Dante's knowledge of Kindeya's decision to choose the Union.

³⁶ It is reasonable to infer that Jacobs would not have interrogated Hambamo as she did unless she knew he was actively involved in the organizational drive. Her knowledge is imputed to Respondent.

³⁷ Where an employer's proffered motivational explanation is false, the trier of fact may infer unlawful motivation. *Hahner, Foreman, & Harness, Inc.*, 343 NLRB 1423, 1429 (2004), citing *Shattuck Denn Mining Corp. (Iron King Branch) v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

³⁸ Discharges on the heels of union activity and evidence of disparate treatment support a finding of pretextual termination. *La Gloria Oil and Gas Co.*, 337 NLRB 1120, 1124 (2002).

³⁹ Gebersalasa and Tesema were employed over three years, Kindeya four years, Demeke and Hailu over six years, and Hambamo nearly eight years.

show length of employment. Since Respondent bears the burden of proving its affirmative defense, the deficiency must weigh against Respondent. Viewed overall, when ranged against the substantial evidence of animus, the comparative documents do not show Respondent has consistently terminated employees who were in the same disciplinary posture as the six alleged discriminatees. Accordingly, I find Respondent discharged Gebersalasa, Demeke, Hailu, Tesema, Kindeya, and Hambamo because each engaged in union activities. Respondent thereby violated Section 8(a)(3).

VI. Representation Case: Objections to the Election Findings of Fact and Discussion

The Union filed a petition for election on March 30. Following a stipulated election agreement, an election by secret ballot was conducted by the Region on May 6 among employees in the unit found appropriate for collective-bargaining.⁴⁰ The Tally of Ballots served on all the parties at the conclusion of the balloting showed the following:

Approximate number of eligible voters.....	235
Number of Void Ballots.....	1
Number of Votes casted for Petitioner.....	93
Number of Votes cast again participating labor organization(s).....	105
Number of Valid votes counted.....	198
Number of Challenged ballots.....	3
Number of Valid votes counted plus challenged ballots.....	201

Thereafter, the Union filed five timely objections to conduct affecting the results of the election on May 12. Objections 1 and 2 parallel the complaint allegations, and I consider them together. Objections 3-5 relate to alleged events occurring during the polling periods, and I consider them together.

A. Legal Overview

The Board does not lightly set aside representation elections. *Quest International*, 338 NLRB 856 (2003); *Safeway, Inc.*, 338 NLRB 525 (2002); *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (citing *NLRB v. Monroe Auto Equipment Co.*, 470 F.2d 1329, 1333 (5th Cir. 1972), cert. denied 412 U.S. 928 (1973)). “There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees.” *NLRB v. Hood Furniture Mfg. Co.*, supra, 941 F.2d at 328, and the burden of proving a Board-supervised election should be set aside is a “heavy one.” *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989) (quoting *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 120 (6th Cir.), cert. denied 416 U.S. 986 (1974)). The objecting party must show that objectionable conduct affected employees in the voting unit. *Avante at Boca Raton, Inc.*, 323 NLRB 555, 560 (1997) (overruling employer’s objection where no evidence unit employees knew of alleged coercive incident).

As the objecting party, the Union has the burden of proving interference with the election. See *Jensen Pre-Cast*, 290 NLRB 547 (1988). The test, applied objectively, is whether

⁴⁰ All full-time and regular part-time taxicab drivers employed by the Employer at its facility located at 4195 West Diablo Drive, Las Vegas, Nevada; excluding all other employees, including mechanics, dispatchers, limousine drivers, confidential and office clerical employees, guards, managers and supervisors as defined in the Act.

an employer's conduct has the tendency to interfere with the employees' freedom of choice. See *Taylor Wharton Division*, 336 NLRB 157, 158 (2001); *Baja's Place*, 268 NLRB 868 (1984).

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B. Objections 1 and 2

1. The Employer illegally fired six (6) employees...for their participation in protected Union activity.⁴¹
2. The Employer during meetings with employees threatened the loss of several benefits if the employees voted for the Union.

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The evidence relating to Objections 1 and 2 has been set forth above in the unfair labor practice case. As to Objection 1, I have found that during the critical period,⁴² Respondent unlawfully discharged union activists, Tesema, Kindeya, and Hambamo, in violation of Section 8(a)(3). Such unlawful conduct "a fortiori, interferes with the results of an election." See *Arkema, Inc.*, 357 NLRB No. 103, slip op. 5 (2011), citing *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786-1787 (1962).

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Objection 2 relates to Dante's March 15-17 statements made in employee meetings. While unlawful under Section 8(a)(1), as noted above, and reasonably having the effect of discouraging employees from voting for the Union, the statements occurred outside the critical period. Accordingly, I recommend that Objection 1 be sustained and Objection 2 be overruled.

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Objections 3, 4, and 5

3. During the voting period and in the polling area an employee engaged in electioneering favorable to the Employer.
4. During the voting period and in the polling area the Employer's observer used her computer for a lengthy amount of time, during which she had access to information as to who had voted and had not voted at the time. The computer was not in view of the Union's observer.
5. During the voting period the Employer engaged in electioneering by having numerous painted antiunion slogans on the windows of a building directly next to the polling area.

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As to Objection 3, during the polling, two voters, the only ones then present, had a brief oral exchange. After receiving his ballot, the first voter asked the second what he should do, and the second voter said, "Vote no." The first voter entered the voting booth and upon emerging, placed his ballot in the ballot box, whereafter the Union's observer belatedly attempted to challenge the ballot. Insofar as the second voter's advice to "vote no" could be considered electioneering, it was both minimal and noncoercive and could, in any event, have affected only one voter. In light of Respondent's 12-vote victory, the voters' exchange could not

⁴¹ At the hearing, the Union withdrew that portion of Objection 1 that alleged Respondent had suspended one (1) employee.

⁴² The critical period during which conduct allegedly affecting the results of a representation election must be examined "commences at the filing of the representation petition and extends through the election." *E.L.C. Electric, Inc.*, 344 NLRB 1200, 1201 fn. 6 (2005). Here, the critical period is March 30 through May 6.

materially have affected the results of the election. Accordingly, I recommend Objection 3 be overruled.

Objection 4 addresses Respondent observer's use of a portable computer during polling periods. During a preelection conference, the Board agent, after ascertaining the use to which the observer's computer would be put and that it did not have internet access, told the observer she could perform the work of inputting schedules during polling periods when voters were not present. Respondent's observer complied with the Board agent's instructions, and the Board agent periodically checked her computer use.⁴³ There is no evidence the observer's computer use impacted the integrity of the election process. See *Cedars-Sinai Medical Center*, 342 NLRB 596, 609 (2005). Accordingly, I recommend Objection 4 be overruled.

As to Objection 5, the voting polls were located in a trailer at the facility adjacent to the building housing Respondent's administrative offices. In route to the polls most voters passed the administrative offices, the windows of which sported "Vote No; No Union" messages. The entrance door to the polling area faced a solid brick wall, the east side of the administrative offices. From the polling area no written campaign materials could be viewed

In considering objections of impermissible electioneering, the Board determines whether the conduct, under the circumstances, warrants an inference that it interfered with the free choice of the voters by assessing the following factors: whether the conduct occurred within or near the polling place, whether the conduct occurred within a designated "no electioneering" area, the extent and nature of the alleged electioneering, whether it was conducted by a party to the election or by employees, and whether it is contrary to the instructions of the Board agent. *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118, 1119 (1982).

Under the circumstances of this case, the evidence is insufficient to warrant an inference that the existence of Vote-No posters interfered with the exercise of the employees' free choice. There is no evidence the posters could be seen by employees waiting in line to vote; they were not displayed in any no-electioneering area, and their placement did not violate any instructions by the Board agent. The evidence provides no basis for inferring that the campaign signs, without more, rose to the level of impermissible electioneering. Accordingly, I recommend Objection 5 be overruled.

VII. CONCLUSIONS AS TO THE UNION'S OBJECTIONS

Inasmuch as I have recommended that Objection 1 be sustained, I recommend the election held on May 6, 2011 in Case No. 28-RC-6766 be set aside and that the representation proceeding be remanded to the Regional Director of Region 28 for the purpose of conducting a second election.

Further, in accordance with *Lufkin Rule Co.*, 147 NLRB 241 (1964) and *Fieldcrest Cannon, Inc.*, 327 NLRB 109 FN 3 (1998), I recommend the following notice be issued in the Notice of Second Election in Case No. 28-RC-6766:

⁴³ I credit the account of Respondent's observer whose testimony was clear, detailed, and specific.

NOTICE TO ALL VOTERS

The election conducted on May 6, 2011 was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with the employees' exercise of a free and reasoned choice among employees in the following unit:

All full-time and regular part-time taxicab drivers employed by the Employer at its facility located at 4195 West Diablo Drive, Las Vegas, Nevada; excluding all other employees, including mechanics, dispatchers, limousine drivers, confidential and office clerical employees, guards, managers and supervisors as defined in the Act.

Therefore, a new election will be held in accordance with the terms of this notice of election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties.⁴⁴

VIII. CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by threatening employees with loss of benefits and other reprisals, by informing employees it would be futile to select the Union as their bargaining representative, by interrogating employees, and by threatening to "hurt" employees.
4. Respondent violated Section 8(a)(3) and (1) of the Act by terminating employees Almethay Gebersalasa, Elias Demeke, Endale Hailu, Melaku Tesema, Assefa Kindeya, and Mesfin Hambamo because they engaged in union or other concerted, protected activities and to discourage employees from engaging in these activities.
5. The unfair labor practices set forth above affect commerce within the meaning of Sections 8(a)(3) and (1) and Section 2(6) and (7) of the Act.
6. By the conduct described in Objection 1, which conduct occurred during the critical election period, Respondent has interfered with the holding of a fair election; the conduct warrants setting aside the election in Case No. 28-RC-006766 that was conducted on May 6, 2011.

REMEDY

Having found Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having unlawfully terminated employees Almethay Gebersalasa, Elias Demeke, Endale Hailu, Melaku Tesema, Assefa Kindeya, and Mesfin Hambamo, it must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed on a quarterly basis from the dates of their discharges to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90

⁴⁴ Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, DC within 14 days from the date of issuance of this Report and recommendations. Exceptions must be received by the Board in Washington by [date].

NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub. nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). Respondent will be ordered to make appropriate emendations to the personnel files of Almethay Gebersalasa, Elias Demeke, Endale Hailu, Melaku Tesema, Assefa Kindeya, and Mesfin Hambamo. Respondent will be ordered to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁵

ORDER

Respondent, Lucky Cab Company., its officers, agents, successors, and assigns, shall

1. Cease and desist from Engaging in the following conduct:

- (a) Threatening employees with loss of benefits and other reprisals, informing employees it would be futile to select the Union as their bargaining representative, interrogating employees, and threatening to “hurt” employees
- (b) Terminating any employee for engaging in union activities and/or to discourage employees from engaging in union activities.
- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

- (a) Within 14 days from the date of this Order, offer Almethay Gebersalasa, Elias Demeke, Endale Hailu, Melaku Tesema, Assefa Kindeya, and Mesfin Hambamo full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.
- (b) Make Almethay Gebersalasa, Elias Demeke, Endale Hailu, Melaku Tesema, Assefa Kindeya, and Mesfin Hambamo whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.
- (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful terminations of Almethay Gebersalasa, Elias Demeke, Endale Hailu, Melaku Tesema, Assefa Kindeya, and Mesfin Hambamo and within 3 days thereafter notify them in writing that this has been done and that the terminations will not be used against them in any way.
- (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

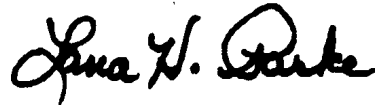
⁴⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

5 (e) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada
copies of the attached notice marked "Appendix."⁴⁶ Copies of the notice, on forms
provided by the Regional Director after being signed by Respondent's authorized
representative, shall be posted by Respondent immediately upon receipt and
maintained for 60 consecutive days in conspicuous places including all places where
10 notices to employees are customarily posted. Reasonable steps shall be taken by
Respondent to ensure that the notices are not altered, defaced, or covered by any
other material. In addition to physical posting of paper notices, the notices shall be
distributed electronically, such as by email, posting on an intranet or an internet site,
and/or other electronic means, if Respondent customarily communicates with its
employees by such means. In the event that, during the pendency of these
15 proceedings, Respondent has gone out of business or closed the facility involved in
these proceedings, Respondent shall duplicate and mail, at its own expense, a copy
of the notice to all current employees and former employees employed by
Respondent at any time since February 24, 2011.

20 (f) Within 21 days after service by the Region, file with the Regional Director a sworn
certification of a responsible official on a form provided by the Region attesting to the
steps that Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the
Act not specifically found.

Dated: Washington, D.C. December 28, 2011



Lana H. Parke
Administrative Law Judge

⁴⁶ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX
NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights. More particularly,
WE WILL NOT threaten employees with loss of benefits and/or other reprisals.
WE WILL NOT inform employees it would be useless to select Industrial, Technical and Professional Employees, Local 4873, affiliated with Office and Professional Employees International Union, AFL-CIO (the Union) or any other union as their bargaining representative.
WE WILL NOT interrogate employees.
WE WILL NOT threaten to hurt employees.
WE WILL NOT discharge any employee for supporting the Union or to discourage employees from engaging in union or other protected, concerted activities.
WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights stated above.

WE WILL offer Almethay Gebersalasa, Elias Demeke, Endale Hailu, Melaku Tesema, Assefa Kindeya, and Mesfin Hambamo full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or to any other rights or privileges previously enjoyed.
WE WILL make Almethay Gebersalasa, Elias Demeke, Endale Hailu, Melaku Tesema, Assefa Kindeya, and Mesfin Hambamo whole for any loss of earnings and other benefits suffered as a result of our unlawful discharges.

WE WILL remove from our files any reference to the unlawful discharges of Almethay Gebersalasa, Elias Demeke, Endale Hailu, Melaku Tesema, Assefa Kindeya, and Mesfin Hambamo and notify them in writing that this has been done and that the discharges will not be used against them in any way.

LUCKY CAB COMPANY

(Employer)

Dated _____

By _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800, Phoenix, AZ 85004-3099

(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640-2146.